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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

70-248

No. ~~1792~~

GERARD A. HARRISON and HARRISON RANCH, INC.,
Petitioners

versus

CAREY PRATHER
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1970

NO.

GERARD A. HARRISON and
HARRISON RANCH, INC.,
Petitioners.

V.

CAREY PRATHER

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Gerard A. Harrison and Harrison Ranch, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered and entered December 16, 1970. Petitioners filed a motion for rehearing and asked for a hearing in banc both of which motions were denied by the Court of Appeals March 9, 1971. The opinion of the Court of Appeals for the Fifth Circuit has not been reported in the Federal Second Reporter. Said suit was styled Gerard A. Harrison and Harrison Ranch, Inc., Plaintiffs-Appellees, Cross-Appellants vs. Carey Prather, Defendant-

Appellant, Cross-Appellee, No. 29023 on the docket of said court.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

There are three main questions presented for review by this Court, that is:

(1) Whether the Court of Appeals erred reversing the District Court's judgment because of an alleged error in the court's charge, that is, the trial court struck out the article "the" and substituted the letter "a" before the words "proximate cause" (Vol. I, p. 564, Dist.Ct.Appendix) although the jury found in answer to interrogatories propounded by the trial court that the defendant wilfully and maliciously with intent to injure plaintiffs interfered with the granting of a loan from Prudential Insurance Company of America to plaintiffs, which act of interference proximately contributed to the decision of the Prudential to decline the loan to plaintiffs (p. 566, Vol. I, Dist.Ct. Appendix). The jury also found that the Prudential would have made the loan to Petitioners (p. 564);

(2) Whether the Petitioners established their damages for lost cattle profits in the amount of $86,352.00 by proper and sufficient proof, as held by the District Court, but later reduced by remittitur to $45,626.00; and

(3) Whether Petitioners waived their objections to the remittitur ordered by the District Court by not excepting to the grant

of such remittitur although the court threatened to grant a new trial if Petitioners did not file a remittitur (Vol. II, p. 603-604, DC Appendix). The Court of Appeals did not pass on this question. See the last page of its opinion.

STATEMENT OF THE CASE

The statement of the nature of the case and the relevant facts are sufficiently set forth in the Court of Appeals' opinion, that is line 1, page 1 through line 2 on page 6 of the Court of Appeals' printed opinion. We take issue with the statement on pages 5 and 6 that Harrison filed the remittitur without protest when the District Judge made it plain that if Petitioners protested a complete new trial would be granted (p. 601-602, Vol. II, DC Appendix). The trial court granted Petitioners fifteen days within which to accept or refuse the order of remittitur which in effect gave the Petitioners no choice.

The Court of Appeals decided this case solely on a question of semantics, that is upon words, not reason or logic. The jury found that the defendant wilfully and maliciously with intent to harm or injure plaintiffs interfered with the granting of the loan by Prudential to plaintiffs, consequently the interrogatory (p. 564 Record) as to proximate cause was mere repetition. The jury had found that the defendant wilfully and maliciously interfered with plaintiffs' business with intent to harm or injure plaintiffs.

If you construe the answer of the jury to the two interrogatories then it is obvious that the finding that the interference was

"a proximate cause" of Prudential not making the loan was a mere confirmation of the wilfull and malicious act.

Where you have a jury finding that the act was wilfull and malicious with intent to harm or injure plaintiffs and said act interfered with the granting of the loan, then the mere changing of the article "the" to the letter "a" before the words "proximate cause" could not possibly cause reversible error. Nevertheless the Court of Appeals' reversal was based upon that action. The jury were not confused. The Court of Appeals held that under the laws and decisions of Mississippi where the case was tried that it was necessary that the case be reversed on the Judge's charge although the jury found that Prudential would have made the loan except for Prather's conduct (p. 564, Vol. I, DC Appendix).

The statement of the facts and the description of the nature of this litigation as set out in the appellate court's opinion is sufficient but the appellate court's conclusions with reference to the meaning and effect of the jury's findings are completely erroneous. The Court of Appeals in effect held that the use of the letter"a" before the words "proximate cause" completely nullified and destroyed the judgment in spite of the previous issue found by the jury, that the defendant wilfully and maliciously with intent to harm or injure plaintiffs interfered with the granting of the loan by Prudential to Petitioners. In addition the jury found that the Prudential would have made the loan to Petitions (p. 564, Vol. I, DC Appendix).

The District Court's jurisdiction was

based upon diversity of citizenship and involved a division of partnership assets. Petitioners sued for a partition of real and personal property, for damages caused by the conversion of certain partnership properties by Prather and for treble damages because of the violation of certain anti-trust statutes, it being alleged that Prather unlawfully prevented Petitioners from obtaining a loan in the amount of $1,090,000.00 from the Prudential Insurance Company of America. The evidence showed that Petitioners carried on an interstate cattle business in various states including the states of Mississippi and Arkansas where large amounts of land were owned or operated by Petitioners for farming, ranching and the propagation of catfish. Gerard A. Harrison was a citizen of Texas carrying on interstate business in Mississippi and various other states and Harrison Ranch, Inc. was a Texas corporation carrying on interstate business in various states including Mississippi.

The U. S. District Court for the Northern District of Mississippi, Greenville Division, had jurisdiction of this cause under Title 28, Sec. 1332 U.S.C.

The Court of Appeals erred in reversing this case on the trial court's charge concerning proximate cause because the case was submitted on interrogatories for a special verdict and consequently the federal rules and decisions apply and not the decisions of Mississippi. The foundation and basis of the Court of Appeals' opinion is therefore specious and invalid.

SUPPLEMENTAL ARGUMENT

The Trial Court's Charge

The Court of Appeals reversed this case because of the trial court's charge which the Court of Appeals held did not comply with the Mississippi law. The trial judge submitted the case on interrogatories requesting a special verdict and the law of Mississippi has no connection with such a submission. On the contrary the federal rules and decisions apply exclusively to such a submission.

There was no conflict in the jury findings. The trial judge carefully instructed the jury and the Mississippi state practice with reference to what is a proper charge was irrelevant. The Court of Appeals has attempted to completely nullify innumerable federal decisions to the effect that if the defendant failed to request the submission of an issue that the defendant waived same, and the nature and scope of the issues submitted to the jury are discretionary with the trial court. These are the federal rules. The trial judge explained to the jury why he changed the article "the" to "a" before the words "proximate cause" in the interrogatory.

Barron and Holtzoff, Federal Practice and Procedure, Vol. 2B, Section 1054, comments upon the discretion of the trial judge in submitting a case on written interrogatories as follows:

> "Where the court does determine to use special verdicts or written interrogatories to accompany a general verdict, it has a similar discretion as to the nature, scope and form of the questions to be put to

the jury." (p. 337)

We refer the Court to the argument set forth in our motion for rehearing to the effect that it is not necessary that it be absolutely certain that a prospective contract would have been entered into were it not for the interference. Reasonable assurance thereof in view of all the circumstances is sufficient. We cited 45 Am. Jur. 2d, Interferences, Sec. 40; Baily vs. Richards, 236 Miss. 523, 111 So.2d 402 (1959). The appellate court cited the case of Bender vs. Dingworth, 425 F.2d 378 (5th Cir. 1970), wherein Judge Goldberg in effect held that the appellate court should attempt to decide whether the jury understood what they were deciding under the court's charge. We agree. We submit that District Judge Smith in his closing instructions to the jury made it plain that he was altering the interrogatory concerning proximate cause by substituting the letter "a" in lieu of the article "the" because of the previous interrogatory submitted to the jury as to whether or not the Prudential Insurance Company would have made the loan to the plaintiffs except for the interference of defendant and there is no conflict in the jury's findings.

The following interrogatories and answers of the jury govern, viz:

> "Did defendant personally or in conjunction with others, acting in his behalf, wilfully and maliciously with intent to harm or injure plaintiffs interfere with the granting of a loan by Prudential Insurance Company of America to plaintiffs.

"Answer - Yes or No.

Yes
Here give answer

"If your answer to the above question is yes, did any such act of interference proximately contribute in whole or in part to the decision of the Prudential Insurance Company of America to decline the loan of plaintiff.

"Answer - Yes or No.

Yes
Here give answer "
(p. 566, Vol. I, DC Appendix)

The Court of Appeals attempted to apply the rules and decisions of Mississippi to the interrogatories according to the opinion of the Court of Appeals. They do not apply because the law governing special verdicts and interrogatories in the federal court is governed by the federal rules. The Mississippi decisions and rules concerning the charge have no significance. The rule is stated in Barron and Holtzoff, Federal Practice and Procedure, Vol. 2B, p. 332, Sec. 1052, as follows:

> "The submission of special verdicts and interrogatories in the federal courts is governed by the federal rules. The state practice is not applicable." (p. 332)

In Travelers Insurance Co. v. Truitt, 280 F.2d 784 (nwh), Circuit Judge Brown held that the Federal Rules of Civil Procedure and not the state practice governed the

procedure in federal suits seeking statutory workmen's compensation, the court saying in part:

> "It is clear that the Federal Rules, not the state practice, govern the procedure in suits seeking statutory compensation. Employers Mutual Liability Ins. Co. v. Blunt, 5 Cir., 1955, 227 F.2d 312, certiorari denied, 350 U.S. 994, 76 S.Ct. 543, 100 L.Ed. 859; Millet v. Godchaux Sugars, 5 Cir., 1957, 241 F.2d 264, 265; 2 Barron & Holtzoff, Federal Practice & Procedure § 1052 (1950 & 1958 Wright Supp.) The issue submitted by the Court was a fair submission of causation. Clegg v. Hardware Mutual Casualty Co., 5 Cir., 1959, 264 F.2d 152, and we find it unnecessary to decide whether under the Texas decisions cited by the Insurer the Texas practice of special issue submission would have required additional special questions. Under the federal practice the ultimate question of fact was clearly submitted to the jury." (p. 789)

This decision would apply not only to the trial court's charge on proximate cause but it would also be relevant to the contention that the decisions of Mississippi govern with reference to plaintiffs' cattle loss, which was established definitely and the jury received a fair instruction from the trial judge concerning same.

Rule 49 FRCP particularly provides for special verdict interrogatories to be propounded by federal courts and subdivision (a) thereof provides in part as follows:

> "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

The form of interrogatory submitted to the jury is within the discretion of the trial judge. It is not governed by the state court rules. Tennessee Consolidated Coal Co. v. United Mine Workers of America, C.A. Tenn. 1969, 416 F.2d 1192, cert.den.

If the federal trial judge decides to submit interrogatories to the jury, he has discretion to draft them in accordance with the facts and circumstances of each case and they shall be interpreted by federal decisions and rules. Sleeman v. Chesapeake & Ohio R. Co., (DC Mich. 1968), 290 F.Supp. 830, affd. 414 F.2d 309.

The state of Mississippi has no statute providing for a submission of a suit by special issues or interrogatories, consequently the decisions of the courts of Mississippi are not relevant. The Court of Appeals in this case violated all the federal rules and federal decisions with reference to the

special issues here involved by holding that the issue submitted must comply with Mississippi law. The Court of Appeals in this case violated certain fundamental decisions of its own and rules concerning special issues. This decision conflicts with previous decisions of many of the Courts of Appeals, including the Court of Appeals for the Fifth Circuit.

The important interrogatories or issues in this case did not include the proximate cause issue which the Court of Appeals relied on and upon which it based its reversal but on the contrary the following issues propounded to the jury and the answers given, viz:

> "(1) Do you believe from a preponderance of the evidence that The Prudential Insurance Company would have made the loan to the Plaintiff?
>
> Yes
> Answer - Yes or No
>
> "If your answer is No, you shall not answer any further questions; but if your answer is Yes, answer question (2) below.
>
> "(2) Do you believe from a preponderance of the evidence that the defendant interfered with the loan?
>
> Yes
> Answer - Yes or No
> (p. 564, Vol. I, DC Appendix)
>
> "Did defendant personally or in conjunction with others, acting in his behalf, wilfully and maliciously with intent to harm or

injure plaintiffs interfere with the granting of a loan by Prudential Insurance Company of America to plaintiffs.

"Answer - Yes or No.

Yes
Here give answer

"If your answer to the above question is yes, did any such act of interference proximately contribute in whole or in part to the decision of the Prudential Insurance Company of America to decline the loan to plaintiff.

"Answer - Yes or No.

Yes
Here give answer"
(p. 566, Vol. I, DC Appendix)

The holding of the Court of Appeals in this case conflicts squarely with the decisions of the Court of Appeals for the Seventh Circuit such as Cohen v. Travelers Ins. Co., C.C.A.7th, 1943, 134 F.2d 378; Thedorf v. Lipsey, C.A.7th, 1956, 237 F.2d 190; Tillman v. Great Am. Indem. Co. of N.Y., C.A.7th, 1953, 207 F.2d 588.

In the Tillman decision the court commented on the Cohen case decision as follows:

"In Cohen v. Travelers Ins.Co., 7 Cir., 134 F.2d 378, 384, we held that the submission of special interrogatories was a matter of procedure and was discretionary with the trial court." (p. 593)

The decision in this case conflicts also with the holdings of the Court of Appeals for the Third Circuit to the effect that federal rules govern the submission of special issues or interrogatories and not state rules. In De Eugenio v. Allis-Chalmers Mfg. Co., C.A.3rd, 1954, 210 F.2d 409, the court said:

> "Rule 49 clearly leaves the matter of the form of a special verdict and interrogatories to the sound discretion of the trial court. Norfolk Southern Ry. v. Davis Frozen Foods, Inc., 4 Cir., 1952, 195 F.2d 662, second appeal, 4 Cir., 204 F.2d 839, certiorari denied, 1953, 346 U. S. 824, 74 S.Ct. 41; Mourikas v. Vardianos, 4 Cir., 1948, 169 F.2d 53." (p. 415)

The decision in this case likewise conflicts with the holdings of the Court of Appeals for the Sixth Circuit such as Gulf Refining Co. v. Fetschan, C.C.A.6th, 1942, 130 F.2d 129, cert.den.

Likewise the Court of Appeals' decision in this case conflicts with the decisions heretofore rendered by that same court such as Garland v. Lane-Wells Co., C.A.5th, 1951, 185 F.2d 857 and Southern Pac. R. R. v. Montalvo, C.A. 5th, 1968, 397 F.2d 50. This latter decision holds that the federal court trial judge can give oral instructions, as was done here, and he is not bound by the local state rules. In the Garland case it was held that the issues of unavoidable accident, negligence and contributory negligence involved procedure and not substantive law and consequently the federal rules governed and not the state of Texas rules.

The general rule with reference to nature and scope of the issues is set forth in Federal Practice and Procedure, Barron and Holtzoff, Vol. 2B, p. 341, Sec. 1055, as follows:

> "The nature and scope of issues to be submitted to the jury is discretionary with the trial court. Thus expressions as to the kind of issues which should be submitted can hardly be more than general guides." (p. 341)

Various cases are cited in support of the above statement, such as Mickey v. Tremco Mfg. Co., C.A.7th, 1955, 226 F.2d 956, the De Eugenio and Tillman cases referred to above, Thorp v. American Aviation & General Ins. Co., C.A.3d, 1954, 212 F.2d 821, Norfolk Southern Ry. Co. v. Davis Frozen Foods, Inc., C.A.4th, 1952, 195 F.2d 662, 204 F.2d 839 cert.den., McDonnell v. Timmerman, C.A. 8th, 1959, 269 F.2d 54. It is apparent from these decisions that the holding of the Court of Appeals in this case conflicts with decisions involving similar questions rendered by the Courts of Appeal for the Third, Fourth, Fifth, Seventh and Eighth Circuits.

In the Thorp decision, supra, the court said:

> "The form of the interrogatories was, of course, in the sound discretion of the District Court, and we are satisfied that those which were propounded to the jury, when viewed in the light of the charge, fully and fairly presented the pertinent issues of the case. See Mourikas v. Vardianos, 4 Cir.,

1948, 169 F.2d 53." (212 F.2d 830)

In McDonnell v. Timmerman, 269 F.2d 54, C.A.8th, 1959, the court held that the scope and nature of the substance of the issues were within the discretion of the federal trial judge and the federal rules applied, the court saying in part as follows:

> "On this claim of error we are dealing with procedure and not substantive law. Rule 49(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., gives to the trial court discretion in the use of special verdicts. This discretion is not limited to the decision of whether or not to utilize a special verdict, but extends beyond to the form of the submitted interrogatories once such decision is made. Thus, in Norfolk Southern Ry. Co., v. Davis Frozen Foods, Inc., 4 Cir., 1952, 195 F.2d 662, second appeal 204 F.2d 839, certiorari denied, 346 U.S. 824, 71 S.Ct. 41, 98 L.Ed. 349, the court upheld the use of interrogatories inquiring into, as here, the general causal negligence of each party, stating:
>
> "'The formulation of issues, however, is a matter resting in the sound discretion of the trial judge, * *. The number and form of issues, if they present the case fairly, is a matter resting in the sound discretion of the trial judge. Rule 49(a) of Rules of Civil Procedure, 28 U.S.C.A.' 195 F.2d at page 666.

"See also, Thorp v. American Aviation and General Insurance Co., 3 Cir., 1954, 212 F.2d 821; DeEugenio v. Allis-Chalmers Mfg. Co., 3 Cir., 1954, 210 F.2d 409; Mourikas v. Vardianos, 4 Cir., 1948, 169 F.2d 53." (p. 58)

The federal decisions hold that formulation of the issues is within the sound discretion of the trial judge, as is the number and the form of the issues. These questions involve matters of procedure and not substantive law.

Jurisdiction

We have heretofore referred to the statute 28 U.S.C. Sec. 1254(1) which grants the Supreme Court jurisdiction of this case but we particularly wish to call attention to Rule 19(b) of the Supreme Court Rules which reads as follows:

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a

> lower court, as to call for an exercise of this court's power of supervision."

The decision of the Court of Appeals in this case conflicts with the various decisions of other Courts of Appeals and likewise previous decisions of this Court of Appeals as we have heretofore indicated.

Establishing Lost Profits

We cited many relevant cases with reference to this subject as appear on pages 43, 44, 45, 46, 47, 48, 49, 50 and 51 of our original brief filed in the U. S. Court of Appeals and also pages 10 and 11 of our reply brief and pages 7, 8 and 9 of our motion for rehearing.

On page 13 of our rejoinder brief, we cited the decision of Boeing v. Shipman, 411 F.2d 365, 5th Cir., 1969, nwh, which was a decision rendered en banc decided by Chief Judge Brown, and Circuit Judges Rives, Wisdom, Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer, Simpson and Morgan. The first case note for that decision reads as follows:

> "In diversity cases federal courts apply federal rather than state test for sufficiency of evidence to create jury question. Fed.Rules Civ.Proc. rule 50, 28 U.S.C.A." (p. 365)

The Court of Appeals ignored this recent decision and criticized plaintiffs for not bringing in sufficient records. In this connection, we explained to the District Judge that we had brought in a great number of

records in connection with the deposition of Harrison which was partially taken and the records were left in Greenville, Mississippi over the weekend and disappeared. This statement to the court appears on pages 723 and 724 of Vol. II of the appendix filed in the district court and reads as follows:

> "BY MR. MOORE:
>
> Now, Judge, we had a deposition taken here way back yonder, got messed up with an order to stay, and at that time we had a great number of records which we produced in connection with the taking of that deposition, and the following day, the following court day, I don't remember whether it was Monday or Tuesday, anyway, we were stayed, and those records and many of those books and ledgers and so forth, disappeared. I mean, we went ahead and left them here, and we thought that they were either with the notary or either else had been put in the clerk's office. Many of them have disappeared. Mr. Harrison has not been able to find them, nor have we been able to find them." (p. 723, 724)

In spite of the loss of these records, we produced many records referred to on pages 8 and 9 of our motion for rehearing filed in the Court of Appeals. We set out therein the cattle prices and records with reference to Petitioners' cattle sales and activities for the years 1963, 1964 and 1965, which are the important years involved.

Mr. Harrison testified on cross-examination from various ledgers and records he

produced. For instance he was examined by Mr. Mansour as follows:

"BY MR. MANSOUR:

Q Mr. Harrison, do you now have in your hands, sir, the general ledger for Harrison Ranch for nineteen hundred sixty-three? A Yes, sir.

Q And that has a page in there showing the cattle operations of cattle sales, does it not? A No, it is purchases.

Q Purchases. Well doesn't that show your various balances throughout 1963 of dollar value of your cattle? A No, I wouldn't think that would; no.

BY MR. MANSOUR:

If Your Honor please, may I approach the witness so I can look at the exhibit too?

BY THE COURT:

Yes, sir, you may. Place it over there to the side where both of you can look at it.

BY MR. MANSOUR:

Q Mr. Harrison, doesn't it show that on January 31st, that you had a balance on hand of livestock purchases of nineteen thousand eight hundred forty-nine dollars and eighty-three cents?
A For that year?

Q On January 31st, doesn't it show that your balance on hand of livestock is nineteen thousand -- (interrupted)
A No, it don't. That ain't inventory. That is purchases made during this year. We bought nineteen thousand dollars worth of cattle here on January 31st. Now, that is the inventory -- No, wait a minute. No, we bought ninety bulls here January the 31st, that was what was bought in January, nineteen thousand dollars worth.

Q All right, sir. Does this ledger here show the amount of cattle that you had on hand in 1963, on December 31st, 1964? A Yes, sir. Wait a minute; wait a minute. On what date?

Q December 31. This ledger shows it for '63, does it not? A This ledger? That is '63.

Q All right, doesn't it show the amount of livestock you had on hand in December, '1963? A Yes, sir. I have January 1st, '64, three hundred ninety thousand, same thing."
(p. 997, 998, 999, Vol. II, DC Appendix)

Again, in the same Volume II, p. 1001, DC Appendix, Mr. Mansour's examination refers to these records, viz:

"BY MR. MANSOUR:

Q Mr. Harrison, I hand you, sir, defendant's Exhibit No. 27 for identification and ask you if that is not the general ledger for G. A. Harrison for 1963? A Yes, sir.

Q And I ask you to look at this inventory sheet in there and if it does not show that on January 1, of 1963, you had livestock inventory of six hundred and thirty thousand dollars? A Sixty-three?

Q My question, does that record show that? A Yes, sir, I believe that is right. Yes, sir, I believe it is right. I remember it now.

BY MR. MANSOUR:

If Your Honor please, may I take these back to the clerk?" (p. 1001, Vol. II, DC Appendix)

It is apparent from these examinations that Mr. Harrison testified at length from books and records and his statement concerning losses is based upon books and records as well as his own knowledge and testimony.

We could quote and refer to many other examinations of books and records produced by Harrison. The finding by the Court of Appeals that Harrison testified as an expert and that no other testimony was available to show his cattle loss is completely erroneous. The trial judge was fully familiar with the case and he held Petitioners' proof sufficient, although he cut down the recovery to one-half by remittitur.

Again Harrison testified as follows with reference to cattle in Nebraska, viz:

"Q In regard to the cattle mentioned in Section 6, what was the disposition of that section? A We had some steers in a Nebraska feed lot,

and I went and managed them, took a nutrition man there and watched the feeding of them and managed the sale of them, and the money was sent to Richmond PCA.

Q Do you recall approximately what it was? A I don't. I don't remember how many. We have had there around four or five hundred, I think."
(p. 815, Vol. II, DC Appendix)

Again on pages 852 and 853 of Vol. II, DC Appendix, Harrison testified with reference to the cattle he would have purchased if he had the loan as follows:

"Q Did you or not buy cattle in the fall and winter of 1964? A No, very few.

Q Why? A Well, I didn't have the money when this loan was turned down.

Q All right, sir. Do you recall approximately how many head of cattle you would have purchased if you had had the loan? A Well, we always, in the ranch, purchased around--- (interrupted)

Q Just give me the approximate number, please? A Thirty-five hundred.

Q If you made that purchase where would you ordinarily buy those cattle? A Always bought them in Florida and principally in Texas.

Q All right, sir. About how many cattle did you buy in 1964? A I didn't have money enough to buy but twelve hundred seventy-six, I believe, replacements.

Q Why didn't you have the money?
A Because this loan was turned down. I couldn't get any money."
(p. 852, 853, Vol. II, DC Appendix)

Respondents continually examined Harrison as to his recollection and opened the door to similar direct examination.

On page 898, Vol. II, DC Appendix, Harrison testified to the loss of records as follows:

"BY THE WITNESS:

These were brought up here when you first took the deposition. You know we lost a lot of those, that stuff, but all of those cattle deals and everything, chattel mortgages, they were brought here. Now I don't know how many of those disappeared. We couldn't find a lot of that stuff. We have been looking for it."
(p. 898, Vol. II, DC Appendix)

Harrison testified with reference to cattle purchased the latter part of 1964 and the first part of 1965 and produced records to sustain his testimony, that is Exhibit No. 14, see pages 938, 939 and 940, Vol. II, DC Appendix. His testimony read in part as follows:

"Q Mr. Harrison, after the session of court yesterday, did you make an examination of the records that had been produced here in response to a subpoena duces tecum to ascertain what cattle had been bought and what sold during the year 1964? A Yes,

sir. Sixty-five, wasn't it?

Q Sixty-four and sixty-five? A Yes, sir.

Q All right, sir. Now, I am talking about the amount of cattle that was purchased the latter part of '64 or first part of '65? A Yes, sir.

Q Now, I believe you endeavored to testify with reference to what cattle you would have purchased if you had had sufficient funds and the Court required you to give some record evidence of the cattle you actually purchased. Did you endeavor to do so? A Yes, sir.

Q All right, sir. Do you have the records there that shows the purchases of the cattle that you made in 1965? A Yes, sir, I have the regular purchases that shows the amount of money here, but don't show the number of heads, but I will have that sent right away.

BY MR. MOORE:

May we have it marked, Your Honor?

BY THE COURT:

Yes, sir, you may. Just remove that if that is the only part of the book that you want introduced.

BY MR. MOORE:

Just the page.

BY THE COURT:

All right. Can you remove it from your ledger?

BY THE WITNESS:

Yes, sir, I think so.

BY THE COURT:

All right, let it be handed to the clerk and marked for identification.

BY THE CLERK:

Plaintiffs' Exhibit No. 14 for identification.

(Whereupon, the said instrument was accordingly marked Exhibit No. 14 for identification.)

BY THE COURT:

Pass it to the opposing counsel. Do you desire to introduce it into evidence?

BY MR. MOORE:

Yes, sir.

BY THE COURT:

All right. Is there any objection?

BY MR. MANSOUR:

No objection.

BY THE COURT:

All right, let it be received in evidence.

(Whereupon, the said exhibit previously marked No. 14 for identification, was received in evidence.)

BY MR. MOORE:

Q Mr. Harrison, this plaintiffs' Exhibit 14, can you explain to the jury what cattle these items referred to beginning with around July 31, 1964?
A They are the replacement cattle that I bought to go on the ranch around locally, Arkansas and Mississippi, that is all I could buy that year, about twelve hundred and seventy-six of them, as I recall."
(p. 938, 939, 940, Vol. II, DC Appendix)

Again Harrison testified with reference to records as follows:

"Q Mr. Harrison, that is what, has what exhibit number on it? A Fifteen.

Q Fifteen. Can you tell the jury what that instrument is? A That is a ledger sheet showing the sales of cattle in 1966.

BY MR. MOORE:

We would like to offer it in evidence, Your Honor.

BY THE COURT:

All right, just a moment.

All right, Mr. Mansour?

BY MR. MANSOUR:

We object, if Your Honor please, on the ground that it is not the original record and that -- (interrupted)

BY THE COURT:

All right, let me ask him the question. What is that exhibit that you have there; is it the original?

BY THE WITNESS:

No, sir, it is a photostat of the original.

BY THE COURT:

It is a picture of it?

BY THE WITNESS:

Yes, sir.

BY THE COURT:

Do you have the original present?

BY THE WITNESS:

No. It is in Houston. We photostated all of the books and brought up here.

BY THE COURT:

All right, the objection will be overruled."
(p. 963, 964 and 965, Vol.II DC Appendix)

With reference to records brought into court by Harrison we find that the district court appendix does not contain Exhibit 14 which was read to the jury as is evident from the following testimony which was set forth in the stenographer's transcript of the evidence taken April 2, 1969 beginning on line 23, page 371 and continuing over to line 3, page 380 of the stenographer's transcript, viz:

"BY MR. MOORE:

Your Honor, I believe that I had offered this in evidence, if I didn't, I wish to do so now. It is plaintiffs' Exhibit 14.

BY THE COURT:

Yes, sir, it has already been introduced in evidence.

Has it been marked as an exhibit?

BY THE CLERK:

Yes, sir.

BY MR. MOORE:

I would like to read it to the jury now.

Q Mr. Harrison, can you tell the jury what these figures reflect, what they pertain to? A They pertain to the purchase of twelve hundred seventy-some-odd head of replacement cattle, small cattle, we buy and put on the ranch and graze for six to nine months, and get them ready for the feed lot. That was all I bought in '64.

Q But ordinarily, can you tell the jury what time of year did you buy these cattle? A We buy them from, if you start, maybe just a few from July and August, and maybe a few more in September, mostly October and November, maybe some in December. We have bought occasionally on through the winter.

Q Have you been able to find any records that indicate the number of livestock that these figures pertain to? A No, sir. I haven't. We have searched in there, but we haven't been able to find that yet, have a man in there looking now.

Q These are records that you brought in response to the subpoena duces tecum? A Yes, sir.

BY MR. MOORE:

Your Honor, we would like to read, if we may, just the latter part of this, these records, as to the amount.

BY THE COURT:

All right, sir.

BY MR. MOORE:

This is Exhibit 14, his ledger. 'In July, 31, 1964, forty RPCA, seven folio, twenty-four hundred thirty-eight dollars; 'August 31, 1964, RPCA, eight folio, five thousand three hundred fifty-nine dollars and thirty cents;

'September the 30th, 1964, RPCA, folio ten, twenty-three thousand---'

I beg your pardon --

'Twenty-three thousand 61108;

'March 30 --'

I beg your pardon --'

'November 30, 1964, RPCA, eleven, twenty-four thousand two hundred fifty-six dollars and sixty-seven cents;
'December the blank, 1964, CW, 41, --'

That is folio number four one,

'Eight thousand seven hundred seventy-eight dollars and sixty-four cents.'

Now, there seems to be on this record a notation, 'Cash of Sale, thirty-six thousand one hundred thirty-three dollars.'

BY THE COURT:

Just a moment.

BY MR. MANSOUR:

I believe, I believe that is, 'Cost of sale,' and not, 'Cash of sale.'

BY THE COURT:

All right.

BY MR. MOORE:

May be; may be. I was going to ask the witness what this stood, if I may?

BY THE COURT:

Yes, sir.

BY MR. MOORE:

Q What is the last figure here, thirty-six thousand one three? A I don't know. I think -- (interrupted)

BY MR. MANSOUR:

I object, if Your Honor please, to the witness stating if he does not know.

BY MR. MOORE:

Q Would you look at it and tell the jury what it is, if you know? A Yes, sir.

BY THE COURT:

Just a moment. When I have an objection made, I want the opportunity to rule on it before you proceed further.

Mr. Marshal, get the exhibit and tender it to the witness and let him examine it, and then you can pursue your examination.

BY THE WITNESS:

It says -- (interrupted)

BY THE COURT:

Now, Mr. Moore, you may proceed to examine him about it.

BY MR. MOORE:

Q I am just asking you this, at this time, about the last figure, is that cash of sale or cost? A It looks to me like it is cost of sale, a closing entry made by the accountant, meaning could be freight, or a lot of things in purchase that they close out to balance the books.

BY MR. MANSOUR:

If Your Honor please, we object to his interpretation of that instrument now.

BY THE COURT:

The objection is overruled.

BY MR. MOORE:

Q These figures that I have read to the jury, tell the jury, if you know, what they were for? A They are for the purchase of twelve hundred, approximately twelve hundred seventy-six replacement cattle.

Q All right, sir. Were those monies expended for that purchase and paid? A Yes, sir.

Q And were the cattle delivered as you indicated? A Yes, sir.

BY MR. MANSOUR:

Object to the form of the question, Your Honor.

BY THE COURT:

Yes, sir. The question is leading, Mr. Moore. I want you to expedite the trial, but you will have to stay within the rules.

BY MR. MOORE:

Q State whether or not that is the amount of money used in the purchase of the cattle? A That is the amount delivered to the ranch.

Q Is it the amount of money used in the purchase of cattle? A Yes, sir.

Q Have you been able to find the records showing the sale of those cattle?

BY THE COURT:

Just a minute. Mr. Mansour wants to make an objection.

BY MR. MANSOUR:

I hate to continue to do it, if Your Honor please, but counsel really is testifying himself in that last question.

BY THE COURT:

All right, sir. That is all right. I understand the nature of the objection.

There is not any need to argue.

Mr. Moore, I know you can question this witness without leading. So you can phrase your questions without leading. Try to do that, please, sir.

BY MR. MOORE:

Yes, sir.

Q Can you tell the jury whether or not those monies were paid for those cattle? A Yes, sir, it was paid for them, delivered to the ranch.

Q And later on were the cattle -- Well, strike that, if the Court please.

How long did you retain possession of those cattle? A We kept them up until August of '65 and September of '65, I believe.

Q And then what was done with those cattle? A They were put in that joint venture feeding, fattening them at live cattle with the Union Feed Yards.

Q And what became of them? A They were fattened and sold in Los Angeles.

Q Have you made a search for the record to ascertain the amount received for them or not? A Yes, sir.

Q Have you been able to find those records up to this time? A I have found part of them.

Q Now, from those records can you tell the Court whether or not that was more

or less cattle than you would have purchased had your loan been lent you?
A Well, we would have bought thirty-five or thirty-six hundred if I had the money to do so.

Q And what was the reason why you didn't do so? A I didn't have the money."
(line 23, page 371 through line 3, page 380, DC Transcript of 4/2/69)

This record shows the purchase of 1270 head of small cattle bought in 1964 by Harrison and it supports the calculations he made showing a cattle loss of $86,352.00 on page 15 of the Court's opinion.

The finding that Harrison did not produce records but on the contrary testified from memory or from his knowledge of the cattle business is completely untrue as is apparent from the foregoing. Harrison testified from records maintained in his office or the office of Harrison Ranch, Inc.

We could continue to refer to page after page of such testimony based upon records produced but to do so would unduly prolong this application.

The Court of Appeals did not rule on the question of whether the court's action in providing a remittitur as an alternative to permitting a new trial was appealable (see p. 22 of the Court's opinion). Respondent contended we had waived our right to appeal as to the remittitur. We replied to that contention in some detail on pages 55, 56, 57 and 58 of our main brief filed in the Court of Appeals and also on page 14 of our rejoinder brief.

A copy of the District Court's opinion is attached hereto marked Appendix A and a copy of the Court of Appeals' opinion is attached hereto marked Appendix B.

CONCLUSION

In our motion for rehearing we attacked the decision of this Court of Appeals as being a fitting companion of the famous "semicolon court" decisions, where a reconstruction court in Texas decided a case because of the location of a semicolon in a document. There is no question that the jury chose to decide to answer the interrogatories in a manner favorable to Petitioners and did so. It is also obvious that the Court of Appeals rendered a decision in this case which is directly in conflict with decisions of various other Courts of Appeals and also contrary to certain previous decisions of the Court of Appeals for the Fifth Circuit.

The trial judge tried this case carefully and considered all the questions raised by the Court of Appeals' decision in detail as is apparent from the Record. We ask that the decision of the appellate court be reversed and judgment be rendered in favor of the Petitioners for the entire amount originally awarded by the trial judge, that is $88,802.00, or in the alternative for the amount of the judgment entered after the granting of the remittitur, that is for $45,626.00 with interest thereon at six percent per annum from July 14, 1969 and that Petitioners be granted such other and further

relief to which they may be entitled by virtue of the premises.

Respectfully submitted,

FRED W. MOORE
1809 First National Life Bldg.
Houston, Texas

Attorney for Petitioners

CERTIFICATE

Copies of the above and foregoing petition for writ of certiorari were mailed to Mr. Philip Mansour, P. O. Box 773, Greenville, Mississippi, 38701, and Mr. Taylor Webb of the firm of Webb & Webb, 311 Broad Street, Leland, Mississippi, 38756, this _____day of June, 1971.

Fred W. Moore,
Attorney for Petitioners

By _____

A B Letter Service, Inc.
327 Rue Chartres
New Orleans, Louisiana 70130

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

GERARD A. HARRISON and HARRISON RANCH, INC.,	)	
Plaintiffs	)	No. GC 6552-S
VS.	)	
CAREY PRATHER,	)	
Defendant	)	

OPINION

The plaintiffs, Gerard A. Harrison and Harrison Ranch, Inc., brought this multi-issue controversy seeking (1) a partition of land under 28 U.S.C. §1655, (2) damages as a result of the appropriation of certain partnership property, and (3) treble damages under 15 U.S.C. §15, in that the defendant unlawfully prevented the plaintiff, Gerard A. Harrison, from obtaining a loan from Prudential Life Insurance Company. The defendant counterclaimed alleging (1) that the plaintiff, Gerard A. Harrison, and the defendant, Carey Prather, had negotiated An Agreement To Dissolve Partnership and Partition Of Property, which Harrison refused to honor, and (2) that certain partnership property had been appropriated by the plaintiffs, Harrison and Harrison Ranch, Inc.

The cause was tried before a jury and the Court submitted the fact issues to the

jury in the form of special interrogatories. The jury found that the plaintiff, Gerard A. Harrison, was not forced to sign the contract dated February 1, 1965, concerning the termination of "P & H Farms" partnership because of "business compulsion" or "economic duress". The jury also found that Harrison did not sign contracts dated February 17, and February 19, 1965, concerning the partition of the Woollard tract because of "business compulsion" or "economic duress". The jury found that the plaintiffs converted certain feed belonging to the partnership to their use and that the value of the feed was $900.00. The jury found that the plaintiffs did not convert a certain power unit jointly owned by Gerard Harrison and Carey Prather. The jury found that the plaintiffs agreed that the defendant might retain a certain tool chest without the tools in the division of the partnership property. The jury found that Carey Prather appropriated certain tools and tool chest belonging to the partnership of "P & H Farms" to his own use and that the value of Harrison's interest was $750.00. The jury found that the plaintiffs incurred damage in the division of the "P & H Farms" equipment in the amount of $2,600.00. Finally, the jury found that the defendant, Carey Prather, conspired to prevent the plaintiff, Gerard A. Harrison, from obtaining a loan from the Prudential Life Insurance Company, that the conspiracy prevented Harrison from obtaining the loan, and that such conspiracy was in restraint of interstate trade or commerce. The jury found that as result of the conspiracy the plaintiffs suffered a loss of profits from cattle operations in the amount of $86,352.00.

The Court must now decide whether to treble the damages under 15 U.S.C. §15. The Court accepts as conclusive the determination made by the trier of fact that the defendant conspired with other parties to prevent the plaintiff, Gerard Harrison, from obtaining a loan from Prudential Life Insurance Company, and that such conspiracy ultimately resulted in a restraint on interstate trade or commerce. Yet whether the facts, and the conclusions of fact of the jury, bring the controversy within the treble damage statute is a matter of law for the Court to determine. Gary Theater Company v. Columbia Pictures Corp., et al, 120 F.2d 891, 7 Cir. 1941.

There are certain evidentiary facts which must be considered along with the conclusions of fact of the jury. The consideration of such facts by the Court is not an attempt to invade the province of the jury as trier of facts, but rather is founded on the necessity to consider certain basic facts which are not reflected in the conclusions of fact as set forth in the special interrogatories.

The pertinent facts are thus. On December 20, 1963, the plaintiff, Gerard A. Harrison, and the defendant, Carey B. Prather, formed a general partnership known as "P & H Farms". The purpose of the partnership was to farm approximately 9,382 acres of land located in Mississippi and Arkansas. The partnership was unsuccessful and in the fall of 1964 the parties began talks concerning the dissolution of the partnership. There was apparently a lack of harmony in the dissolution negotiations. The conspiracy, found by the jury, occurred during the fall of 1964. The conspiracy

prevented Harrison from refinancing his operations with Prudential Life Insurance Company, and thus prevented him from buying the normal number of cattle which he was accustomed to buying annually. The deterriment to the cattle operation constituted the restraint of trade or commerce.

It is significant that the plaintiffs state in the complaint that the intent of the conspirators was to "kill" the loan and prevent Harrison from receiving financing so that the conspirators or others could buy the land of Harrison at reduced prices. (page 8 of plaintiffs' Third Amended Original Complaint).

The plaintiffs put on proof to show that they suffered damage from the conspiracy in that they could not make money that they normally would have made from cattle operations, but there was no proof to show that there was any damage to the public, or that the defendant was using any type of monopolistic power. Harrison did not attempt to prove that the loan from Prudential was the only source of refinancing, but rather it was the preferred source for the plaintiff. Harrison did secure a loan from American General Life Insurance Company in the spring of 1965, but this was too late to buy the cattle at his accustomed period of purchase (which was approximately October through January).

The antitrust laws are very broad and have played an important part as a safeguard of economic liberty in our country. The purpose of the antitrust laws has been set forth many times.

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democractic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the act is competition and to this end it prohibits 'every contract, combination . . . or conspiracy, in restrain of trade or commerce among the several states'. Although this prohibition is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." Northern Pacific Railway Co. v. United States of America, 356 U.S. 1 at 4, 2 L.Ed 2d 545, 78 S. Ct. 514, 1958.

The rule of reason as it has become known was set forth in Standard Oil Company v. United States, 221 U.S. 1, 55 L.Ed. 619, 31 S. Ct. 502, 1910, and was later clarified in Board of Trade v. United States, 246 U.S. 231, 62 L. Ed. 683 38 S. Ct. 242, 1918.

It is important to delineate the nature of the controversy that is involved sub judice. We are not dealing with price fixing, division of markets, group boycotts or tying arrangements which have been labeled by the courts a per se violations of the antitrust statutes. Yet the plaintiffs allege that the actions of the defendant constitute a per se violation. The per se classification is founded, if at all, on the language and reasoning of the Northern Pacific case, supra, 356 U.S. at 5. "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without a elaborate inquiry as to the precise harm they have caused or the business excuse for their use".

In the present case the conspiracy concerned acts by one partner to prevent another partner from achieving an isolated loan from an insurance company. There is no proof that the defendant conspired to prevent the plaintiff from making a loan with any other financial institution. The same year that the conspiracy occurred, the parties had been in partnership to farm land. There is no evidence of any monopolistic power used by one party, and there was certainly no proof of any tendency to monopolize.

The thrust of the conspiracy, as set forth in the plaintiffs' complaint, was not to damage the plaintiffs' cattle operations, but was to cause the plaintiff to sell his land at reduced prices. Hence the effect on the line of commerce was residual or secondary to the thrust of the

conspiracy to prevent refinancing of the land. Under the circumstances, the Court cannot see how a partnership disagreement which, among other things, caused a secondary restraint on interstate commerce, can fall within the reasoned bounds of the antitrust statutes. The gravamen of the controversy is patently a disagreement between two partners as evidenced by the fact that in the same action each partner seeks a division of partnership assets and each accuses the other of converting certain assets. Certainly the treble damage provision of the antitrust statutes was not intended for residual effects on interstate commerce caused by a disgruntled partner. There is a remedy in tort for such a situation, and the plaintiff has obviously sought and obtained a penalty for his grievance.

The plaintiff has made much of the fact that recovery in a treble damage antitrust case does not depend upon proving economic injury to the public. In Re McConnell, 370 U.S. 230, at 231, 8 L.Ed. 2d. 434, 82 S. Ct. 1288, 1962. The plaintiff relies very heavily on Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L.Ed. 2d 741, 79 S. Ct. 705, 1959. Yet in Klor's the Court was concerned with group boycotts which are plainly within the per se category. At 359 U.S. 213 the Court states: "It interfers with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character', a 'monopolistic tendency.'" In Radiant Burners v. Peoples Gas Light and Coke Company, 364 U.S. 656, 5 L.Ed. 2d 358, 81 S. Ct. 365, 1961, the Supreme Court was concerned with a dismissal for failure to state a claim upon which relief could be granted. The complaint alleged that certain

defendants had refused to supply gas for use in the plaintiff's produce. The Court found that the alleged conspiratorial refusal to provide gas for use in the plaintiff's produce "clearly has by its nature and character, a monopolistic tendency". 364 U.S. at 660. In Radiovich v. National Football League, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390, 1957, the Supreme Court was again concerned with a dismissal for failure to state a claim upon which relief could be granted. The court reversed stating that "Congress has, by legislative fiat, determined that such prohibited activities are injurous to the public", 352 U.S. 453, but the court further stated that on remand the claim would have to be tested under the Sherman Act's general prohibition on unreasonable restraints of trade, 352 U.S. at 453.

This Court is quick to acknowledge that the Supreme Court has set forth that public injury is not an essential element to recovery under the treble damage statute. Yet the Court does not feel that the rule of reason has been abandoned so that any residual restraint on interstate commerce can be brought within the treble damage statute of the antitrust laws. In Albrecht v. The Herald Company, 390 U.S. 145, at 154, 19 L.Ed. 2d 998, 88 S. Ct. 869, 1968, Justice Douglas in a concurring opinion referred to the rule of reason stemming from Standard Oil, supra and the Board of Trade, supra, as living doctrine which must be considered by the Courts. The Fifth Circuit has also reaffirmed the doctrine in North Texas Producers Association v. Young, 308 F.2d at 240, 5 Cir. 1962. "The Rule of Construction is the Rule of Reason, which requires an interpretation in the light of broad public policy favoring competition in condemning

monopoly. The Courts are to decide where the conduct is significantly or reasonably anticompetitive in character or effect."

In summary the Court does not feel that the treble damage statute should be literally construed to achieve unreasonable results. Harrison v. Paramount Pictures, Inc., et al, 115 F. Supp. 312, E.D. of Penn. 1953 Aff., 211 F.2d 405, Cert. denied 348 U.S. 828. Nor does the Court feel that the antitrust acts provide a remedy for any and all torts that may effect interstate commerce. Hunt v. Crumboch, 325 U.S. 821 at 826, 89 L.Ed 1954, 65 S. Ct. 267, 1945. "The antitrust laws were never meant as a panacea for all wrongs". Parmelee Transportation Co. v. Keeshin, et al, 292 F.2d 794 at 804, 7 Cir. 1961, Cert. denied 368 U.S. 944. In the case sub judice the isolated residual restraint on interstate commerce caused by the conspiratorial act of a disgruntled partner has not significantly affected interstate commerce, and has not tended to monopolize any line of commerce, and therefore does not fall within the bounds of the treble damage statute.

An appropriate judgment will be entered in accordance with the special interrogatories of the jury and the opinion of the Court.

This the 14th day of July, 1969.

s/Orma R. Smith
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29023

GERARD A. HARRISON and HARRISON RANCH, INC.,

Plaintiffs-Appellees,
Cross-Appellants,

versus

CAREY PRATHER,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the Northern District of Mississippi

(December 16, 1970)

Before BELL, THORNBERRY and CLARK, Circuit Judges.

CLARK, Circuit Judge: Reluctant because our principal role is to end disputes, we must nevertheless add another chapter to the history of a bitter internecine legal war that flows from the termination of that closest of business relationships — a partnership. Our desire to write finis here is thwarted by con-

flicting instructions to the jury on the standard of proximate cause applicable to the tort of interfering with the making of a contract. The cause must now go back for a trial under the correct standard.

The plaintiffs, Gerard A. Harrison and Harrison Ranch, Inc. (Harrison), residents of Texas, brought suit against Carey Prather (Prather), a resident of Mississippi,[1] seeking: (1) a partition of real property under 28 U.S.C.A. § 1655 (1966); (2) damages resulting from the alleged appropriation by Prather of certain partnership personal property and (3) treble damages under 15 U.S.C.A. § 15 (1963), on the ground that Prather allegedly unlawfully prevented Harrison from obtaining a loan in the amount of 1,090,000 dollars from the Prudential Insurance Company of America (Prudential), thereby causing a loss of anticipated profits from future farming operations and cattle business. Prather counterclaimed, alleging that Harrison should be required to honor an agreement to dissolve the partnership and to partition the property; and, that certain partnership property had been appropriated by Harrison.[2] A jury trial, making use of special interroga-

[1]During oral argument in this court, appellant indicated that a question existed as to whether the principal place of business of the corporate plaintiff, Harrison Ranches, Inc., within the meaning of 28 U.S.C.A. § 1332(c) (1966), might not be in Mississippi. This court is without factual basis to resolve this question. Our reference here is not intended to pass upon that issue.

[2]This is the second appearance of this action in the appellate court. The suit, as initially filed, was against Carey Prather and his brother, William Prather. William Prather was served with process at his home in Louisiana. Carey Prather claimed that William Prather was improperly served and joined, the trial court agreed, and, on appeal, this court affirmed. Harrison v. Prather, 404 F.2d 267 (5th Cir. 1968).

tories to segregate the jury's action on the various claims, resulted in a net verdict for Harrison. After a remittitur, the verdict was embodied in a judgment in Harrison's favor. The appeal by Prather and cross-appeal by Harrison eventuated.[3]

Among the multiplex issues spawned by this judicial donnybrook, the primary controversy in this forum focuses on Prather's activities relating to Harrison's attempt to obtain the Prudential loan in late 1964 and the consequences of Prudential's declination. Many of the material facts relating to this particular transaction, as developed at the trial, are in sharp dispute, but the following synopsis sufficiently frames the controversy.

This suit had its genesis on December 20, 1963 when Harrison and Prather entered into an agreement creating a partnership named "P & H Farms", which was to last for one year commencing January 1, 1964. The partnership was organized for the purpose of farming lands located in Washington County, Mississippi. During the autumn of 1964, Harrison notified Prather of his desire to terminate the partnership and a formal agreement to such effect was signed by the parties on February 1, 1965.

On December 15, 1964, Harrison made application to Prudential for a loan of 1,090,000 dollars. Prudential

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[3]The court below instructed the issue of claimed losses from farming operations out of the case submitted to the jury. Harrison does not assign this action as error on his cross-appeal. The issue is therefore eliminated from the cause.

declined to make the loan on January 15, 1965. Harrison asserts that Prudential declined the loan because of a conspiracy between Prather and two others which had as its object to destroy Harrison's credit, thereby making it impossible for Harrison to obtain a loan and thus force him to sell his land at reduced prices. Specifically, Harrison alleges that Prather and his fellow conspirators interfered with the processing of his loan application to Prudential and that this meddling actually killed the loan. Harrison's principal proof of this fiscal ambush was a tape recording of a conversation between Prather and a third party (secretly Harrison's envoy) in which Prather stated that he knew who could stop a loan approval. The taped conversation further tended to establish that one Pickett Myers killed Harrison's loan at Prather's direction. Prather introduced witnesses employed by Prudential who testified that they were in no way influenced by Pickett Myers, but rather that they declined the loan because the loan application forms were incomplete, Harrison's financial statement was weak, the real estate security was located in two states, part of the lands were utilized in cattle operations and the lands had a low ratio of crops allotments to the total acreage.

After a full trial, the jury rendered its verdict on special interrogatories by which the jury made specific findings: that Prather personally or in conjunction with others acting in his behalf, wilfully and maliciously interfered with the granting of a loan by Prudential; that Prather's interference proximately contributed in whole or in part to the decision of Prudental to decline the loan; that Harrison incurred losses in connection

with his cattle operation during the last part of 1964 and the first part of 1965 in the amount of 86,352 dollars proximately resulting from the said acts of interference; that Prather's conspiracy was in restraint of interstate trade.

The jury also specially found that Prather was liable to Harrison in the amounts of 2,600 dollars for the wrongful removal of parts and equipment by Prather and 750 dollars for the wrongful appropriation of tools in connection with the division of partnership property and that Harrison was liable to Prather for 900 dollars because Harrison had appropriated feed belonging to the partnership. The balance of these findings struck in Harrison's favor in the sum of 88,802 dollars. After first ruling that Prather had not violated the antitrust laws and refusing to treble the jury's loan interference award pursuant to 15 U.S.C.A. § 15 (1963), the trial judge entered a judgment in favor of Harrison for 88,802 dollars.

Prather filed post-judgment motions for relief from judgment, stay of execution, leave to withdraw the original tape recording for analysis by an expert and, in the alternative, for judgment notwithstanding the verdict or a new trial. The district court denied the motion for leave to withdraw the tape recording and denied Prather's motions for relief from judgment and for judgment notwithstanding the verdict, but sustained his motion for a new trial unless Harrison accepted a remittitur of 43,167 dollars — 50 per cent of the amount allegedly resulting from the failure to obtain the Prudential loan. Without protest, Harrison filed the re-

mittitur and the district court entered final judgment in Harrison's behalf in the sum of 45,626 dollars.

On the direct appeal, Prather insists that the district court committed thirteen errors. In the cross-appeal Harrison asserts that three errors occurred. In view of the basis for our ruling here, it becomes unnecessary to discuss all of these contentions. The pivotal issue is alleged error of the district court in instructing the jury as to the standard to be applied in determining whether Prather's alleged interference caused the disapproval of Harrison's loan. Because we determine that the court adopted an incorrect gauge to measure this critical element and the case must be reversed for a redetermination of this issue under a more stringent rule, we deem it appropriate to pass upon two other issues that may recur upon retrial — (a) were future cattle profits established by competent proof and (b) did the district court err in holding that the federal antitrust laws were not applicable in this case?

I. *THE* PROXIMATE CAUSE vs. *A* PROXIMATE CAUSE

It is not the abstruse concept of probable cause alone that controls our decision in this cause, but, literally, the issue sharpens to whether "the" or "a" is the proper modifier. Even within the dubious logic of semantics, it is apt to observe that seldom has so little led to the downfall of so much.

During his charge the trial judge initially instructed the jury that they would be required to answer an interrogatory providing: Do you believe from a pre-

ponderance of the evidence that the defendant's interference caused Prudential not to make the loan?"[4] However, on taking objections of counsel after completing his charge, the judge observed the quoted interrogatory language conflicted with another interrogatory which provided that liability should be affixed if Prather took actions "proximately contributing in whole or in part to the decision of the Prudential Insurance Company of America to decline the loan. . . ."

To resolve the clear conflict between the sole cause and contributing cause standards in these two statements, the judge proposed to change the former interrogatory to accord with his concept that Prather's actions need not be the sole cause of Prudential's refusal to render him liable.

Prather's attorney objected to this alteration in the interrogatory on the basis that it did not state the correct rule in a claim for interference with the making of a contract, contending that the plaintiffs must prove that the loan would have been *but for* for the defendant's interference. The judge disagreed.

Back in the presence of the jury, the judge announced and explained the change he was making. He then struck out the typed word "the" with his pen and inserted in its place the word "a". He concluded his remarks by declaring: "I have changed the question to

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[4]When the interrogatory was typed out it took a slightly different form but with an identical meaning:
Do you believe from a preponderance of the evidence that the defendant's interference was the proximate cause of Prudential not making the loan?

provide whether or not it was a 'proximate cause', not a sole cause." Upon that comment the jury retired to deliberate. Before us, Prather reasserts his position that the *but for* test is the proper guide.

To determine if the verdict of the jury on the contract interference issue should have been permitted to stand, we must pass upon the threshold question as to whether any real distinction can be found between the *but for*, or the proximate cause, gauge and the contributing cause, or *a* proximate cause, test. Secondly, we must determine which test is apropos in this cause. Finally, if there is a difference, and if the improper standard was used here, we must decide whether the error was prejudicial.

While sometimes not easily comprehended in a specific factual context, there is a significant difference between the two guidelines and the law has long demanded that this difference be observed. The controversy raised by counsel before us now and, more emphatically, the action of the trial judge in changing the language of the interrogatories and then explaining its significance to the jury, attest to this fact.

The *but for*, or *the* proximate cause, requirement imposes a greater burden of proof upon the plaintiff than does an *a* proximate cause instruction. The former requires a plaintiff to prove not only that an act caused an event, but that the event would not have occurred without, or but for, the wrongful act. *Kramer Service v. Wilkins*, 184 Miss. 483, 186 So. 625 (1939). This stricter standard does not attempt to say that there may not be many causes to an event but, rather, declares that un-

less it can be shown that the wrong would not have occurred had it not been for the particular action in question, then there is no liability. *Fant v. Commercial Carriers*, 210 Miss. 474, 49 So.2d 887 (1951). The but for rule constitutes a rule of exclusion, i.e., it excludes from the ambit of responsibility all acts and omissions which contributed to producing injury or damage unless it can be shown that the wrong would not have happened in the absence of those given causes. An interrogatory phrased in accordance with this requirement would specify, though not expressed in so many words, that the jury could not affix liability unless they found that without Prather's acts Prudential would have approved the loan.

On the other hand, the *a* proximate cause test establishes a broader pathway to liability. When this yardstick is applicable, the defendant's acts do not have to be the single or exclusively efficient factor which caused the injury. *A* proximate cause implies that even if the defendant's act had never occurred the event still would or, at least, could have occurred. The interrogatory used here, as explained by the judge, is a correct embodiment of this less stringent fault measurement.

It is the almost universal value judgment of courts faced with ruling on claims based upon interference with the making of a contract, that the *but for*, or *the* proximate cause, test must be the standard applied.[8] This proposition has been most clearly stated as follows:

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[8]99 A.L.R. 12 (1935)

> Indulging as we must in the hopeful hypothesis that the jury parses every phrase of the trial judge's charge, we must disagree with the defendant's assertion that this error was harmless. In the wide spectrum of decisions affecting proximate cause, we have developed a body of dialectics which has given us some boilerplate charges, many of which become logically distorted by the omission, addition, or rearrangement of a single word or phrase. Moreover, proximate cause is one of the more elusive concepts developed by our jurisprudence. Its philosophic articulation by a court is difficult enough for a jury to apply empirically under the best of circumstances. When the jury is instead given conflicting instructions, first being told that more than one proximate cause may exist and then being told that the plaintiff must exclude every other efficient proximate cause in order to recover, we think it is impossible to assume that the jury obeyed the former and rejected the latter when it found that the defendant's negligence was not a proximate cause of Bender's death. The distinction between "a proximate cause" and "sole proximate cause" is a legal philologist's nightmare. It could hardly be expected that a lay jury would comprehend and correctly apply such a distinction in the fact of conflicting and inadequately defined instructions by the court.

In sum, Mississippi has concurred with the preponderant majority of other forums declaring that in contract interference cases the *but for* test is to be applied.

The case law clearly recognizes a distinction between the *but for* and the *a* proximate cause criteria. The jury should have been instructed to apply the proper test. Since they were not, we must reverse and remand for a new trial.

Because the action must be retired, sound judicial husbandry indicates that we rule on those issues now presented which will probably recur on such retrial.

II. ESTABLISHING LOST PROFITS.

Although a number of Mississippi cases have dealt with the problem of damages due to lost profits, the standard recognized by Mississippi jurisprudence is not entirely clear. This is largely because of a 1935 precedent, *Montgomery Ward and Co. v. Hutchinson*, 173 Miss. 701, 15 So. 862, 863 (1935), allowing recovery of prospective profits, where the Mississippi court ruled:

> Appellant offers suggestions of several possibilities or contingencies which might have happened to defeat any profits. Under our jurisprudence, the rule as to uncertain or speculative damages does not apply to uncertainty as to the amount of the profits which would have been derived . . .

Subsequent cases, while apparently timorous of specifically overruling *Hutchinson*, have certainly freighted the burden imposed on a *Hutchinson* type plaintiff. These more recent cases speak in terms of allowing only the recovery of profits which are as-

certainable with reasonable certainty. *See e.g., United States Finance Co. v. Barber,* 247 Miss. 800, 157 So.2d 394 (1963) and *Mississippi Power Co. v. Harrison,* 247 Miss. 400, 152 So.2d 892 (1963). In the latter case the essential quantum of proof was declared to be that "based upon sound fact, and not on mere opinion evidence, without factual support.... In tort cases, profits which are remote, speculative, or uncertain are neither an element of damages or evidence of damages.

So while Mississippi has made it clear that the lack of a perfect measure of damages does not preclude recovery for damages, it does hold that the most accurate and reliable evidence available should be required to prove profits. From *Koehring Company v. Hyde Construction Company,* 254 Miss. 214, 178 So.2d 838, 853 (1965), we get this statement:

> ...a party... will not be permitted to escape liability because of the lack of a perfect measure of damages.... Therefore, a reasonable basis for computation and the best evidence which is obtainable under the circumstances of the case, and which will enable the trier to arrive at a fair approximate estimate of loss is sufficient proof.

The Federal standard is no less stringent. *Sylvania Electric Products, Inc. v. Flanagan,* 352 F.2d 1005 (1st Cir. 1965); *United States v. Alexander,* 326 F.2d 736 (4th Cir. 1964). Of course, if either standard favored the admission of such evidence, it would be admissible. Rule 43(a), Fed. R. Civ. P. Our review of the record,

however, indicates that despite numerous objections of the defendant and several limiting rulings by the court, Harrison's damage proof did not meet either standard.

At trial, Harrison established his loss of future profits by use of the following formula:

Capacity of farms for new cattle during 1964-65	3500 head
Cattle actually bought during 1964-65	1276 head
Cattle short	2224 head
Customary death losses, 3%	68 head
Price per average 400 lb. calf at 15 cents per pound, plus veterinary, feed, etc.	$ 105.00
Sale Price per fatted calf	$ 147.00
Profit per fatted calf	$ 42.00
Lost Profit (after deducting customary death loss)	$86,352.00

The propriety of using this formula method of proving damages was argued at length in chambers, at which time the trial judge expressed his concern with such proof in these words:

> ... just to say that if you had that money you would have bought a certain number of head of cattle, ... and that if you could have bought that herd, you would have kept it for a certain length of time.... and then at a certain period you could have sold the herd and made a certain profit ... looks to this Court like it is pure speculation.

However, Harrison contended that because of his vast personal knowledge of the cattle business, which qualified him to give expert opinion testimony in this field, and because he had personal knowledge of what he had specifically done with the twelve hundred and seventy-six cattle he was able to purchase, he should not be tied to any specific records. On the basis that a showing of the facts surrounding the purchase and processing of the twelve hundred and seventy-six cattle Harrison actually handled in this period was required in order to give a best obtainable evidence basis to the proof, the judge sustained Prather's objections to the bare use of the formula as a springboard for expert opinion.

Notwithstanding these initial objections and ruling, Harrison was later allowed to testify as an expert to establish lost profits, over a similar objection by Prather on the basis of the formula alone, without supplying records upon which the various formula figures as to unit costs, death losses and sales prices were based. The only record supplied was a sheet out of a ledger, which showed the total dollar amount used to purchase cattle in 1964 without designating the number of cattle bought or any other facts which substantiated the formula.

The trial court this time declared that the proffered testimony was sufficient in the light of Prather's right to cross-examine Harrison on facts disclosed by Harrison's actual operating records. But for one thing, this reasoning is analogous to the reasoning which supports a procedure sometimes followed and approved in which

an expert summary witness, such as an accountant, may produce the actual records from which his summary has been distilled then testify to the summary alone, leaving cross-examination to supply the probity that makes his condensation acceptable as proof of facts. However, an essential element in this procedure cannot be found in the case at bar. Prather claims that these documents had not been produced either in response to a subpoena duces tecum or the judge's clear requirement for production, and the record fails to show that such documentation was ever in fact produced.

There is no inherent conflict between the best evidence rule and the rules of evidence which permit the admission of expert testimony. This is true because an opinion based upon knowledge and experience is not admissible to supply fact proof which is reasonably available. For Harrison, although considered an expert in the cattle field, to testify simply as to his opinion, when actual records of what happened to the cattle purchased and processed on these very lands was not shown to be unavailable, does not satisfy the basic tenet of evidence that the highest degree of proof of which a case is susceptible must be produced. This is the Mississippi rule. *Storm v. Green*, 51 Miss. 103 (1875); *King v. State for the Use and Benefit of Murdock Acceptance Corp.*, 222 So.2d 393 (1969). It is the federal standard as well. *Allen v. W.H.O. Alfalfa Milling Co.*, 272 F.2d 98 (10th Cir. 1959).

On retrial, Harrison should not be allowed to substitute his opinion, expert though it may be, when

proof of actual facts that are more cogent is available and not produced. This ruling is not intended to preclude any showing that other cattle purchases or other use of loan funds could have introduced variants in the cattle operations he actually conducted. Decisions of that sort are committed to the discretion of the judge conducting the trial. What we rule here is that if basic fact records exist, those records, not opinions as to what they could have been, should form the evidentiary basis for introducing their content into this cause.

III. ANTITRUST RECOVERY.

The district judge, in a special interrogatory, submitted to the jury the question of whether the alleged conspiracy to interfere with the Prudential loan was in restraint of interstate trade or commerce. The jury responded affirmatively. In a well-reasoned opinion, the trial judge ruled that the conspiracy had only a residual effect on interstate commerce, and, under the rule of reason, denied treble damages under the federal antitrust laws — specifically, 15 U.S.C.A. § 15 (1963). Harrison cross-appeals on this point, asserting that the antitrust laws are applicable when the plaintiff proves an unlawful restraint of trade and personal damages. We agree with the lower court that the application of this principle was a matter of law properly decided by the court and that the court correctly denied triple recovery.

The rule of reason as it has become known was set forth in *Standard Oil Co. v. United States,* 221 U.S. 1, 55 L.Ed. 619, 31 S.Ct. 502 (1910). It has been approved

and expounded in numerous cases. A concise example is the following language from *Northern Pacific Railway Co. v. United States of America*, 356 U.S. 1 at 4, 2 L.Ed. 2d 545, 78 S.Ct. 514 (1958):

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the act is competition and to this end it prohibits 'every contract, combination ... or conspiracy, in restraint of trade or commerce among the several states'. Although this prohibition is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition."

This Circuit is clearly committed to the application of this rule as a principle of law.

> The rule of construction is the rule of reason, which requires an interpretation in the light of broad public policy favoring competition and

> condemning monopoly. The courts are to decide where the conduct is significantly or reasonably anti-competitive in character or effect.: Texas Association v. Young, 308 F.2d at 240 (5th Cir. 1962).

Prather was not alleged to have engaged in any practice considered a per se antitrust violation — i.e. price fixing, division of markets, group boycotts or tying arrangements. These activities are, without more, considered unreasonable restraints of competition and violations of the law's prohibition.

We do agree with Harrison's contention that the recovery of treble damages does not depend upon proving public injury. But the proposition that recovery is possible if an individual proves purely personal damages, does not establish the necessary element of restraint of commerce. Harrison's authorities consist entirely of per se violation cases or cases involving activities which by their nature and character had a monopolistic tendency. See, for example, *Radiant Burners v. People Gas Light and Coke Company*, 364 U.S. 656, 5 L.Ed.2d 358, 81 S.Ct. 365 (1961). Such a monopolistic tendency is not present in the case at bar.

Our conclusions are best expressed by the following excerpt from the trial court's opinion:

> In summary the Court does not feel that the treble damage statute should be literally construed to achieve unreasonable results. *Harrison v. Paramount Pictures, Inc., et al*, 115

F. Supp. 312, E.D. of Penn. 1953 Aff., 211 F.2d 405, Cert. denied 348 U.S. 828. Nor does the Court feel that the antitrust acts provide a remedy for any and all torts that may effect interstate commerce. *Hunt v. Crumboch*, 325 U.S. 821 at 826, 89 L.Ed 1954, 65 S. Ct. 267, 1945. "The antitrust laws were never meant as a panacea for all wrongs". *Parmelee Transportation Co. v. Keeshin, et al*, 292 F.2d 794 at 804, 7 Cir. 1961, Cert. denied 368 U.S. 944. In the case sub judice the isolated residual restraint on interstate commerce caused by the conspiratorial act of a disgruntled partner has not significantly affected interstate commerce, and has not tended to monopolize any line of commerce, and therefore does not fall within the bounds of the treble damage statute.

On remand, all reference to the antitrust claims should be excluded.

IV. OTHER ISSUES.

Here again the wisdom of using special interrogatories in a complex factual situation is proven. See Chief Judge Brown's concurring opinions in *Horne v. Georgia Southern & Fla. R.R. Co.*, 421 F.2d 975 (5th Cir. 1970) and *Little v. Bankers Life and Cas. Co.*, 426 F.2d 509 (5th Cir. 1970). The answers of the jury to interrogatories concerning all issues in the cause other than the loan interference matter were free from error. We are therefore enabled to affirm the judgment on the various other items of damage covered in these

interrogatories and eliminate these claims from consideration on remand. We do not reach the question of whether the court's action in providing a remittitur as an alternative to a new trial was still appealable after plaintiffs entered their remittitur without protest. We deem it inappropriate to now comment on the prior refusal of the trial court to allow the defendants to analyze the original tape recording, except to observe that the matter was one committed to the court's discretion. We have no way of knowing what factors may weigh in favor of or against such an appraisal of this critical piece of evidence on remand or even whether analysis will again be sought. We, therefore, leave the initial resolution of this issue, if it arises, to that court without comment.

AFFIRMED in part, REVERSED in part and REMANDED.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 70-248

GERARD A. HARRISON and HARRISON RANCH, INC.,
Petitioners,
vs.
CAREY PRATHER.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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vs.

CAREY PRATHER.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully move this Court for an order vacating its denial of their Petition for Writ of Certiorari in the above cause entered October 12, 1971 and ask that this Court grant said petition.

The principal question presented by our petition for certiorari was whether the Court of Appeals erred in reversing this cause because of the charge given by the trial judge wherein he changed the article "the" to the letter "a" before the words "proximate cause".

We cited numerous decisions of the Third, Fourth, Fifth, Seventh and Eighth Circuits set out on pages eight, nine, ten, eleven, twelve, thirteen, fourteen and fifteen of our petition for certiorari which conflict with this decision of the Fifth Circuit which holds that the submission of interrogatories to the jury is governed by the decisions of the Mississippi courts. The cited decisions of said other circuit courts of appeal conflict with this decision of the Fifth Circuit by holding that the Federal rules concerning the court's charge, not the state practice, applies. Those courts hold the state practice is not applicable.

We did not cite, however, numerous other decisions of said other Circuit Courts of Appeal to the effect that in considering the validity of the trial court's charge, the whole charge should be considered and not merely one passage or part thereof. The Court of Appeals for the Fifth Circuit persists in holding that in determining the validity of the trial court's charge, the whole charge cannot be considered but only the particular passage objected to, which holding said court for the Fifth Circuit followed not only in this case but also in said court's decision of *Bender* v. *Dingwerth*, 425 F.2d 378 (5th Cir. 1970). These two decisions, that is the *Harrison* and *Bender* decisions, are completely contrary to the decisions of the First, Second, Third, Sixth, Eighth and Tenth Circuits which hold that the whole charge should be considered.

We did not cite these other decisions in our petition although such substantial ground for reversal and rendition was available to us but was not presented. We urge them

now in accordance with Sec. 2, Rule 58 SCR. Petitioners are referred to herein as plaintiffs and respondent as defendant.

The conflicting decisions we cited held that the submission of the case to the jury on interrogatories was governed by Federal decisions and rules and not by state decisions as held by the Fifth Circuit Court. The additional decisions rendered in said other Circuit Courts and cited in this motion hold that the entire charge should be considered and not merely a part thereof as the Fifth Circuit Court holds.

FIRST POINT

The jury found that the Prudential Insurance Company would have made the loan to the plaintiffs but that the defendant interfered with the loan, that defendant's interference was "a" proximate cause of Prudential not making the loan and such refusal caused the plaintiffs to suffer lost profits from their cattle operations in the amount of $86,352.00. The appellate court erred in holding that the use of the letter "a" in lieu of the article "the" before the words "proximate cause" by the trial judge was reversible error.

SECOND POINT

The jury found in answer to other interrogatories that the defendant personally or in conjunction with others acting in his behalf, wilfully and maliciously with the intent to harm or injure the plaintiffs, interfered with the granting of the loan by the Prudential Insurance Company to plaintiffs which proximately caused the plaintiffs' loss. Such a finding made that part of the charge involving the

use of the letter "a" in lieu of the article "the" by the trial court immaterial and the Court of Appeals for the Fifth Circuit erred in reversing and rendering said trial court judgment on such ground.

THIRD POINT

The Court of Appeals for the Fifth Circuit erred in requiring a jury finding that defendant's interference with the Prudential Insurance Company's loan to plaintiffs was the sole and only cause of Prudential not making the loan to plaintiffs when the jury found that Prudential would have made the loan to plaintiffs except for defendant's interference, which the jury found was willful and malicious, and done with intent to harm or injure plaintiffs and proximately resulted in lost profits to plaintiffs in the amount of $86,352.00.

STATEMENT, AUTHORITIES AND ARGUMENT UNDER FIRST, SECOND AND THIRD POINTS

In his opinion rendered in this case, *Harrison* v. *Prather*, 435 F.2d 1168, Circuit Judge Clark acknowledges that he followed the recent decision of *Bender* v. *Dingwerth*, 425 F.2d 378 (5th Cir. 1970). He quotes the rather effulgent language of Judge Goldberg in that case and belittles the ability of a lay jury to comprehend and correctly apply differences in the court's charge. It is apparent however that in this case the trial judge aided the jury by explaining his charge.

Furthermore there are conflicts in the holdings of the Fifth Circuit with reference to this question. Some recent decisions of that appellate court hold that the whole charge should be considered and not just a part thereof and that

when so considered the entire charge could cure errors therein, *Lyle* v. *R. N. Adams Const. Co.*, 402 F.2d 323 (C.A. Tex. 1968). In that decision the Fifth Circuit Court held:

> "The court's charge, with the sole exception of the one statement complained of, articulates the controlling issues in great detail. The charge must be read as a whole in order to determine whether the jury understood the basic issues to be decided.
>
> "Portions of a charge are not to be scrutinized on appeal apart from their context as isolated verbal phenomena. The charge on the contrary must on appeal be looked at as a whole.
>
> "Goodyear Fabric Corp. v. Hirss, 169 F.2d 115, 117 (1st Cir. 1948). See also Harris v. United States, 367 F.2d 633 (1st Cir. 1966); Charles A. Wright, Inc. v. F. D. Rich Co., 354 F.2d 710 (1st Cir. 1965). We do not read Dement v. Olin-Mathieson Chemical Corp., 282 F.2d 76 (5th Cir. 1960), cited by appellants, as authority to the contrary." (p. 327)

In addition to said decisions cited above from the First Circuit, that court has supported our contentions in various other decisions.

Recently the Second Circuit Court of Appeals made a similar ruling as is evidenced by the decision of *Nielsen* v. *Charles Kurz & Co.*, 295 F.2d 692, cert.den. 82 S.Ct. 1147, 369 U.S. 876 (C.A. N.Y. 1961).

Said Court of Appeals for the Second Circuit held in commenting upon this question as follows:

> "His chief attack is upon the judge's charge, various portions of which he wrenches from context to give an appearance of error. Viewed as a whole we think the charge appropriate. Doubtless the wording could have been improved here and there, but the general submission to the jury was fair." (pp. 692, 693)

See also *Rowe* v. *Pennsylvania Greyhound Lines, Inc.*, 231 F.2d 992, cert. den. 76 S.Ct. 1052 (C.A. N.Y. 1956). The Court of Appeals for the Third Circuit likewise supports our views. Its decisions conflict with the rules laid down by Justices Clark and Goldberg as is evidenced by such recent decisions as *Ely* v. *Reading Co.*, 424 F.2d 758 (C.A. Pa. 1970) and *McCarthy* v. *Kroger Co.*, 385 F.2d 150 (C.A. Pa. 1967). In the *Ely* decision, the court said:

> "In examining an alleged erroneous instruction to the jury, it is necessary to view the charge as a whole. It must be determined whether the charge 'taken as a whole, fairly and adequately submits the issues in the case to the jury.' When this standard is applied here, it is obvious that the charge as a whole adequately put in issue both the engineer's and Mr. Johnson's actions." (pp. 760, 761)

See also *Dostal* v. *Baltimore & O. R. Co.*, 189 F.2d 352 (C.A. Pa. 1951) and *Burch* v. *Reading Co.*, 240 F.2d 574, cert.den. 77 S.Ct. 1045 (C.A. Pa. 1957).

Likewise the Court of Appeals for the Sixth Circuit construes charges as a whole and refuses to reverse decisions when the whole charge was fair and proper. See *Louisville & N. R. Co.* v. *Farmer*, 220 F.2d 90, reh.den. 224 F.2d 599 (C.A. Tenn. 1955) and *Tyree* v. *N. Y. Cent. R. Co.*, 382 F.2d 524, cert.den. 88 S.Ct. 589 (C.A. Ohio 1967). In the *Tyree* decision it was contended that the court erroneously defined proximate cause but the court said:

> "Judge Martin, in speaking for this court, said in Spaeth v. United States, 232 F.2d 776, 777, C.A. 6, 'that a reviewing court should not pick out one erroneous paragraph of a long charge and reverse upon it, if, upon consideration of the entire charge, it appears that the jurors were correctly instructed as to the applicable law in such manner as to leave no confusion in their minds.' " (p. 527)

The Eighth Circuit Court of Appeals construes the whole charge together and not a small part thereof as is evidenced by the decision styled *Walton* v. *Eckhart,* 354 F.2d 35 (C.A. Iowa 1965), which held that although one instruction with respect to intervening efficient cause was not a complete definition in view of the fact that other instructions correctly stated the applicable law on the subject, reversal was not warranted. *Lowe* v. *Taylor Steel Products Co.,* 373 F.2d 65, cert.den. 88 S.Ct. 85 (C.A. Iowa 1967); *Jiffy Markets, Inc.* v. *Vogel,* 340 F.2d 495 (C.A. Mo. 1965), held that an erroneous instruction was harmless error when the charge considered as a whole was correct. See also *Turner County, S. D.* v. *Miller,* 170 F.2d 820, cert.den. 69 S.Ct. 656 (C.A. S.D. 1949).

The definition of "harmless error" is set out in Rule 61 FRCP as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Obviously the changing of "a" to "the" could not possibly affect the substantial rights of the parties when the trial court's charge is considered as a whole. *Apperwhite* v. *Illinois Cent. R. Co.,* 239 F.2d 306 (C.A. Mo. 1957).

The Tenth Circuit Court of Appeals will not reverse a decision because of an error in the charge if it correctly instructs the jury when the charge is considered as a whole, *Dyess* v. *W. W. Clyde & Co.,* 132 F.2d 972 (C.C.A. Utah

1943); *Krieger* v. *Bausch,* 377 F.2d 398 (C.A. Colo. 1967); *Lohr* v. *Tittle,* 275 F.2d 662 (C.A. Kan. 1960). The court in *Connecticut Fire Insurance Co.* v. *Fox,* 361 F.2d 1 (C.A. Wyo. 1966), held that the trial court's instructions to the jury must be considered as a whole and not piecemeal.

All the Federal court decisions in Mississippi do not follow these decisions of Judges Clark and Goldberg of which we complain. On the contrary the court held on various occasions that a jury charge shall not be read in fragments. In *McDaniel* v. *Slade,* 404 F.2d 607 (C.A. Miss. 1968), the court said:

> "A jury charge is comprehensive and ought not to be read in fragments. Our scrutiny of the district court's instructions must be orbitary and universal, not narrow and monocular. In the present instance the charge of the trial court, when viewed in its full context, fairly presented the law to the jury and is not rightfully subject to impugnment." (p. 609)

The Court of Appeals for the Fifth Circuit has held in several cases originating in Texas, in addition to the *Lyle* decision, supra, that the charge must be considered as a whole and should be viewed from the standpoint of the jury. *Garrett* v. *Campbell,* 360 F.2d 382 (C.A. Tex. 1966); *Grey* v. *First National Bank in Dallas,* 393 F.2d 371, cert. den. 89 S.Ct. 398 (C.A. Tex. 1968); *Forester* v. *Texas & P. Ry. Co.,* 338 F.2d 970 (C.A. Tex. 1964).

CONCLUSION

This decision is contrary to the great weight of authority in this country and indeed is contrary to recent decisions of the Fifth Circuit Court as is indicated above.

The finding of the jury that the Prudential Insurance Company would have made the loan except for the inter-

ference of the defendant which resulted in damage should be sufficient but in addition the jury went on to find that the defendant personally, or in conjunction with others, acting in his behalf wilfully and maliciously with intent to harm or injure plaintiffs interfered with the granting of a loan to them by Prudential Insurance Company which resulted in damages to plaintiffs in the amount of $86,352.00.

If this reversal because of the change of "a" to "the" in the court's charge is allowed to stand, it will not only result in great injustice but will lead to confusion as to the law applicable to this situation. The Fifth Circuit Court is promoting litigation, not terminating it.

This decision is not only grossly unjust but evidences a callous disregard for the law as found by other Federal appellate courts. We ask that the writ of certiorari be granted and that upon hearing thereof that said decision of the Court of Appeals be reversed and rendered and that the original judgment of the trial court in the amount of $88,802.00 with interest and costs as taxed by the trial court be affirmed, or, in the alternative that the judgment of the trial court in the amount of $45,626.00 with interest and costs as taxed by the trial court after the remittitur, be affirmed, and that petitioners be granted such other and further relief to which they may be entitled by virtue of the premises.

Respectfully submitted,

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Attorney for Petitioners

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

FRED W. MOORE
Attorney for Petitioners

CERTIFICATE OF SERVICE

Copies of the above and foregoing petition for rehearing of this Court's order denying petitioners' petition for writ of certiorari, were mailed properly addressed to Mr. Philip Mansour, P. O. Box 773, Greenville, Mississippi, 38701, and Mr. Taylor Webb of the firm of Webb & Webb, 311 Broad Street, Leland, Mississippi, 38756, attorneys for respondent, this 29th day of October, 1971.

FRED W. MOORE
Attorney for Petitioners